FILED
APR 7 1997
OFFICE OF THE CLERK

(4) (3)

NOS. 96–954 & 96-1230

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

AMOCO PRODUCTION COMPANY, *et al.*,
Petitioners,
v.
PUBLIC SERVICE COMPANY OF COLORADO, *et al.*,
Respondents.

WILLIAMS NATURAL GAS COMPANY,
Cross-Petitioner,
v.
AMOCO PRODUCTION COMPANY, ANADARKO PETROLEUM CORPORATION, MOBIL OIL CORPORATION, OXY USA, INC.
AND
UNION PACIFIC RESOURCES COMPANY,
Cross-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF *AMICI CURIAE* STATE OF KANSAS and KANSAS CORPORATION COMMISSION IN SUPPORT OF PETITIONERS

---

20 pp

CARLA STOVALL
ATTORNEY GENERAL
OF THE STATE OF
KANSAS
JOHN CAMPBELL
CHIEF DEPUTY
ATTORNEY GENERAL
KANSAS JUDICIAL CENTER
301 S.W. 10TH STREET
TOPEKA, KANSAS 66612
(913) 296–2215

DAVID J. HEINEMANN
GENERAL COUNSEL
OF THE KANSAS
CORPORATION
COMMISSION
JOHN MCNISH
ASSISTANT GENERAL
COUNSEL OF THE
KANSAS
CORPORATION
COMMISSION
1500 SOUTHWEST
ARROWHEAD ROAD
TOPEKA, KANSAS 66604
(913) 271–3110

ROBERT J. WOODY
Counsel of Record
D. E. WILSON, JR.
RICHARD GREER MORGAN
LANE & MITTENDORF LLP
919 18TH STREET, N.W.
SUITE 800
WASHINGTON, D.C. 20006
(202) 785–6901

Counsel for Amici Curiae

NOS. 96–954 & 96-1230

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

AMOCO PRODUCTION COMPANY, *et al.*,
Petitioners,

v.

PUBLIC SERVICE COMPANY OF COLORADO, *et al.*,
Respondents.

WILLIAMS NATURAL GAS COMPANY,
Cross-Petitioner,

v.

AMOCO PRODUCTION COMPANY, ANADARKO PETROLEUM CORPORATION, MOBIL OIL CORPORATION, OXY USA, INC.
AND
UNION PACIFIC RESOURCES COMPANY,
Cross-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF *AMICI CURIAE* STATE OF KANSAS and KANSAS CORPORATION COMMISSION IN SUPPORT OF PETITIONERS

TABLE OF CONTENTS

STATEMENT OF INTEREST OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. The D.C. Circuit's Decision Will Have A Severe Adverse Impact on Kansas 4

II. The D. C. Circuit's Decision Applies the Incorrect Standard. 6

A. The Correct Standard of Review is Based on Deference. 6

B. The Court of Appeal's Decision Illustrates the Pitfalls of De Novo Review of Agency Decisions. 7

III. De Novo Review Violates Federalism Principles Contained in the NGPA. 9

IV. Conclusion 13

TABLE OF AUTHORITIES

Cases

Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas, 489 U.S. 493 (1989). 2,9,10,12

Chevron, U.S.A., Inc. v. *Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984) 6

United States v. *Shimer*, 367 U.S. 374, 382 (1961). 7

FPC v. *Panhandle Eastern Pipeline Co.*, 337 U.S. 498, 513–14 (1949) 12

Public Service Co. of Colo. v. *F.E.R.C.*, 91 F.3d 1478 (D.C. Cir. 1996). 1

Colorado Interstate Gas Co. v. FERC, 850 F.2d 769 (D.C. Cir. 1988). 9

Federal Statutes

Natural Gas Act, 15 U.S.C. § 717 (1996) . . . 10, 11

Natural Gas Policy Act, 15 U.S.C. §§ 3301-3432 (1978) 2, 11

State Statutes

Kan. Stat. Ann. § 55–701 & 703 (1996). 1

Federal Energy Regulatory Commission Orders and Opinions

Colorado Interstate Gas Co., 69 FERC ¶ 61,292 (1993). 2

Independent Oil & Gas Ass'n, 7 FERC ¶ 61,094 at 61,143 (1979). 8

Other

State of Kansas, Department of Revenue, Statistical Report of Property Assessment and Taxation, Table VIa (March 1996). 4

Kansas Corporation Commission, Internal Report, 2 (June 16, 1996). 5

State of Kansas, Department of Revenue Annual Report, 48 (1996). 5

Hart's Oil and Gas World, Supp., *The Oil & Gas Producing Industry in Your State*, 1996-97 (Ind. Pet. Ass'n Am.), 100-07. 4

Interstate Oil and Gas Compact Commission, *Marginal Oil and Gas: Fuel for Economic Growth*, (1996 ed.) 12

Interstate Oil and Gas Compact Commission, *Produce or Plug: The Dilemma Over the Nation's Idle Oil & Gas Wells* (1997) 5

STATEMENT OF INTEREST OF *AMICI CURIAE*

Kansas ("Kansas") is a sovereign state. Its *ad valorem* tax gave rise to the proceedings[1] leading to this petition. Kansas' finances and industry are subject to disruption by the extreme retroactivity mandated by the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals" or "D.C. Circuit") decision at issue here. The Kansas Corporation Commission ("KCC") is the regulatory body charged with, among other duties, preventing the "production of natural gas ... in such manner ... as to constitute waste", and regulating "the taking of natural gas from any and all common sources of supply within this state in order to prevent the inequitable or unfair taking of natural gas from a common source of supply." Kan. Stat. Ann. § 55–701 & 703 (1996). Collectively, *amici* are referred to as "Kansas."

Kansas' interest in this case is twofold. On the first level, Kansas seeks reversal of a Court of Appeals decision which fails to take into account the practical realities of the Kansas gas industry and the impact its retroactivity order will have on this industry. It ignores the effect the decision will have on Kansas' ability to prevent waste of a finite natural resource and to finance its government in a rational way so as to properly serve its citizens.

---

[1] *Public Service Co. of Colo.* v. *F.E.R.C.*, 91 F.3d 1478 (D.C. Cir. 1996). References to the opinion in this case are to the Petitioner's Appendix, "Pet. App. at _."

On the second level, Kansas is concerned with maintaining its proper role in the carefully crafted federal–state compromises, based on constitutional principles, set forth in the Natural Gas Policy Act of 1978 ("NGPA")[2], and approved in *Northwest Cent. Pipeline Corp.* v. *State Corp. Comm'n of Kansas*, 489 U.S. 493 (1989)(*"Northwest Pipeline"*), that underlie this case. This balance is improperly altered by the standard of review used by the D.C. Circuit in reaching its decision. In view of these interests, Kansas is in a unique position to advise the Court as to the governance and constitutional issues raised by the D.C. Circuit's decision.

This brief is filed with the consent of the parties. Copies of the consent letters have been field with the Clerk.

STATEMENT OF THE CASE

This case arises from a 1996 decision[3] of the D.C. Circuit ordering refunds in a Federal Energy Regulatory Commission ("FERC") case[4] retroactive to 1983 rather than 1988. Kansas disagrees with the underlying decision overturning settled agency jurisprudence concerning the status of Kansas' *ad valorem* tax under Section 110 of the NGPA, but understands that issue is not before this Court.

The standard applied by the Court of Appeals to the underlying FERC decision presents an important issue of

---

[2] 15 U.S.C. §§ 3301-3432 (1978).

[3] Note 1, *supra*.

[4] *Colorado Interstate Gas Co.*, 69 FERC ¶ 61,292 (1993).

administrative law which, to Kansas, has serious federalism implications. Petitioner frames the issue in terms of the standard of review to be applied in reviewing agency decisions under broad legislative grants of authority.[5] Cross–petitioner sees a case where a federal court has failed to carry out the directive of the legislative branch[6]. For the reasons set forth below, Kansas supports the Petition and opposes the Cross-Petition.

Kansas' position is that this case demonstrates the need for, and importance of, a uniform standard recognizing the preeminence of agency decisions based on statutorily granted remedial authority. The Court of Appeals' use of *de novo* review, instead of the accepted abuse of discretion standard, introduces a level of uncertainty and capriciousness into agency proceedings which directly and substantially impacts state governance. Kansas, as other sovereign states, must be able to rely upon final orders of the FERC in order to manage the state's natural resources and finances. As a matter of federalism, *de novo* review in these circumstances improperly intrudes on the balance between the states and the federal government captured in legislation such as the NGPA. These are issues at the core of the allocation of power in our federal system and, as applied, are critical to the day–to–day operations of the Republic.

---

[5] Petition of Amoco Production Company., *et al.*, for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, at 2 (hereinafter "Pet. at _").

[6] Cross–Petition of the Williams Natural Gas Company at 6.

REASONS FOR GRANTING THE WRIT

I. The D.C. Circuit's Decision Will Have A Severe Adverse Impact on Kansas.

The adverse impact of the D.C. Circuit's decision on Kansas' industry, conservation and fiscal policy is illustrated by review of the court's retroactivity order. The additional five years of refunds ordered by the appellate court is approximately $430 million (absent interest) above an equal amount of refunds for the years 1988 through 1993. *See* State of Kansas, Department of Revenue, Statistical Report of Property Assessment and Taxation, Table VIa (March 1996). Repayment will come not just from imagined large corporations with presumed larger cash reserves, of which there are few, but rather from hundreds of small producers and land owners, including royalty owners and working interest owners, across the state.

Gas and/or oil is produced in 89 of Kansas' 105 counties. The natural gas reserves in Kansas are the basis of a major state industry, employing approximately 24,000 Kansans. In the context of the national gas industry, in 1995, Kansas ranked 6th among the natural gas producing states (excluding the outer continental shelf which belongs to the federal government), 7th in severance and production taxes collected, and 6th in natural gas revenues with just under $1 billion collected. Hart's Oil and Gas World, Supp., *The Oil & Gas Producing Industry in Your State*, 1996-97 (Ind. Pet. Ass'n Am.), 100-07.

Of the 18,000 gas wells in the state, however, about 3000 are "stripper," or low volume wells[7], with low profit margins. The economic viability of many of these wells is threatened by the D.C. Circuit decision. *See* Kansas Corporation Commission, Internal Report, 2 (June 16, 1996). Kansas is in the process of estimating the number of these and other wells that may be abandoned prematurely due to the increased cost of operation stemming from the 10 years of refunds ordered by the Court of Appeals.

Abandoned or "idle" wells pose economic and conservation dilemmas for Kansas. If left unplugged or improperly plugged, waste results. Yet when plugged, a well is no longer capable of production with the result that the underlying resource is not available for use. In either case, the resources, and the revenue derived from the production of the gas, are lost to Kansas. Interstate Oil and Gas Compact Commission, *Produce or Plug: The Dilemma Over the Nation's Idle Oil and Gas Wells (1997)*.

Current taxes, including *ad valorem*, severance and conservation, represent about 14% of the sale price at the wellhead. State of Kansas, Department of Revenue Annual Report, 48 (1996). The refunds ordered by the Court of Appeals will increase the economic burden on natural gas production substantially, the amount per year depending upon the speed with which the refunds are recaptured. Resulting

---

[7] Stripper wells are defined in the NGPA to be wells producing less than 60 Mcf per day. 15 U.S.C. § 3318 (1978). "Mcf" means 1,000 cubic feet of natural gas measured at a pressure of 14.73 pounds per square inch and a temperature of 60 degrees F. 15 U.S.C. § 3301(29) (1978).

abandonment of low margin gas wells will decrease the supply of gas, reduce tax revenues to Kansas and its local jurisdictions, raise potentially serious waste and conservation issues, and, to some unknown extent, reduce the pool from which repayment of the taxes may be sought.

II. The D.C. Circuit's Decision Applies the Incorrect Standard.

The Court of Appeals opinion begins by citing this Court's decision in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984), and agreeing that the standard of review is one of deference "to the administering agency's interpretation if it is reasonable in light of the structure and purpose of the statute. *Id.* at 842–43." Pet. App. at 6a. This is, however, the last mention of *Chevron* or its standard requiring deference to an administering agency's determination. Instead, the Court of Appeals ignores the standard of *Chevron* and proceeds with a *de novo* review of the underlying FERC decision demonstrating the need for this Court to establish a uniform standard of review of an agency's exercise of remedial authority entrusted to it by Congress.

A. The Correct Standard of Review is Based on Deference.

Petitioner ably demonstrates[8] that the standard of review applied throughout the courts of appeal in cases such as this, involving review of matters which Congress has delegated to an administrative agency for decision, is based on

---

[8] Pet. at 8–14.

deference to that agency's determination. Petitioner's citations show (at 10–11) that regardless of the exact words used by the courts of appeal to define the standard, each decision contains the one factor the D.C. Circuit ignores, namely the principle that Congress entrusted oversight of the particular statute at issue to the agency, not the courts, in the first instance. The result of the D.C. Circuit's oversight, or perhaps judicial overreaching, is a standard of review that fails to give proper deference to the agency's decision. Under the D.C. Circuit's framework for analysis, the importance of the regulatory process is so reduced that no one can possibly "reasonably rely" on an agency's decision, even when the time for appeal has expired. Pet. App. at 24a.

B. The Court of Appeal's Decision Illustrates the Pitfalls of De Novo Review of Agency Decisions.

This Court has consistently deferred to regulatory agency administrative interpretations

> whenever [a] decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.

United States v. *Shimer*, 367 U.S. 374, 382 (1961). Even a cursory review of the NGPA reveals that the statute, and this case, are situations where "a full understanding of the force of

the statutory policy ... has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations." *Id.*

To reverse FERC's decision, the Court of Appeals had to engage in fact finding to support its legal conclusions. The underlying proceedings, however, did not lend themselves conveniently to facts supporting the D.C. Circuit's legal conclusions, so they are loosely inferred from FERC's opinion. For example, the D.C. Circuit places great weight on the fact that there was a lack of "detrimental reliance on the part of the producers,"[9] and concludes that

> [W]e are hard pressed to see how the producers would be harmed in any cognizable way even if they were required to disgorge every dollar they received in recovery of the tax (assuming any party were seeking such extensive relief).

Pet. App. at 23a.

Despite the Court of Appeals' rhetoric, there was "detrimental and substantial reliance" both on the Federal Power Commission's 1974 decision that Kansas' *ad valorem* tax qualified for recovery, and after enactment of the NGPA, on FERC's own reliance on the ante–NGPA Kansas *ad valorem* tax decision as a basis for other Section 110 recovery cases. *See Independent Oil & Gas Ass'n*, 7 FERC ¶ 61,094 at 61,143 (1979). In view of these agency rulings, settled at the time of

---

[9] Pet. App. at 23a.

both the 1983 petition to FERC challenging recoverability of the Kansas tax and the Court of Appeals' 1988 remand decision,[10] the reliance considered so improper by the D.C. Circuit was also justified.

By stating that reliance on the FERC (and the early FPC) decisions was not reasonable, the Court of Appeals implies that Kansas purposefully turned a blind eye toward an issue having a potentially large impact not just on one of the major industries in its state, but also on the ability of Kansas and its political subdivisions to finance their operations through orderly tax revenues. Pet. App. at 24a. Kansas, however, will indeed be harmed by implementation of the Court of Appeals' decision. The disruption to this industry generating 24,000 jobs and almost $100 million per year in *ad valorem* tax revenue alone is a most serious matter. So is the fact that the impact of the retroactivity order will fall not just on large corporations, but also on many small landowners and rural counties without substantial alternative sources of revenue. In view of these fiscal, and related conservation and resource management concerns, Kansas is examining carefully how the additional $430 million, plus interest, will be assessed.

III. *De Novo* Review Violates Federalism Principles Contained in the NGPA.

As with most major pieces of legislation, the NGPA reflects the types of compromises among the states, and between the states and the federal government, made in Congress since the beginning of the Republic. *See Northwest*

---

[10] *Colorado Interstate Gas Co. v. F.E.R.C.*, 850 F.2d 769 (D.C. Cir. 1988).

Pipeline, supra, 489 U.S. at 506–07 (discussing the Natural Gas Act). As a result of long negotiations, decisions were made concerning issues such as intrastate and interstate gas, reconciling the interests of producers, consumers, states with gas reserves and those without, factors to be included in the prices, and calculation of prices themselves.[11] Kansas, as a producer and consumer of natural gas, had varied interests in the bill.

The statute was entrusted to FERC to interpret and administer, taking into account the language of the statute, the legislative history of the Act, data, views and arguments, *etc.*, and balancing the competing interests in an equitable way with knowledge of all aspects of the issues. 15 U.S.C. §§ 3411-3418 (1978). The NGPA as passed by Congress, with the indicated structure of agency interpretation and administration, adequately protects Kansas' interests.

The standard of review applied by the D. C. Circuit, however, removes FERC from its Congressionally–established role as primary administrator of the NGPA and inserts an Article III decision–maker into a political process. This process, part legislative, part judicial and part equitable, illustrates why independent commissions such as FERC were established. They reflect, and are intended to reflect, the policy (and party) divisions and competing interests that shaped the legislation they administer. *See Northwest Pipeline, supra,* 489 U.S. at 510–12. A standard of review which removes the initial decision from such bodies, and absent a compelling constitutional reason,

---

[11] The Clerk of the House is reported to have said that the House–Senate Conference resulting in the NGPA was one of the longest in the history of the Congress.

places it in the hands of individuals whose constitutional makeup and mission are markedly different, impermissibly alters the compromises made by Congress in agreeing to the legislation.

The result of the D.C. Circuit's judicial intrusion, therefore, can be analyzed under separation of powers principles. To Kansas, however, the lens through which the D.C. Circuit viewed this case -- in contrast to the one used by the other circuits -- results in the judicial branch altering a carefully crafted balance struck in Congress among the states' representatives, the administration of which was entrusted to FERC. While the distinction may be subtle, it is vitally important to Kansas that its constitutional role not be reduced through judicial overreaching.

As a practical matter, replacing FERC with an Article III decisionmaker also virtually ensures that this Court's statement in *Northwest Pipeline, supra,* 489 U.S. at 510, cannot be carried out:

> It has long been recognized that absent pre–emptive federal legislation or regulation, States may govern the production of natural resources from a common pool, in order to curb waste and protect the correlative rights of owners.

The Court's thorough analysis of states' and federal government's respective rights under the Natural Gas Act and the Natural Gas Policy Act in *Northwest Pipeline* showed that "pre–emption analysis must be applied sensitively in this area, so as to prevent the diminution of the role Congress reserved to

the States while at the same time preserving the federal role." *Id.* at 515. The role "reserved to the States" includes the ability to take "measures ... in furtherance of legitimate conservation goals." *Id.* at 513.

A decision such as the D.C. Circuit's here, one not taking into account this role because an improper standard of review was applied, will result in federal action that prevents Kansas from being able to take otherwise appropriate state action to preserve this natural resource, resulting in waste and loss of production and property. As this Court said in *Northwest Pipeline, supra,* 489 U.S. at 512, quoting, *FPC* v. *Panhandle Eastern Pipeline Co.* 337 U.S. 498, 513–14 (1949), "we must be careful that we do not 'by an extravagant ... mode of interpretation push powers granted over transportation and rates so as to include production.'" The Court of Appeals has used just such an "extravagant ... mode of interpretation" with the predictable result.

Left as issued, the D.C. Circuit decision will have a chilling, and perhaps devastating, impact on the ability of Kansas to promote natural gas conservation and prevent waste of a valuable resource caused by the premature abandonment of natural gas reserves. This impact is particularly acute on the approximately 3,000 low production and margin stripper wells in Kansas. As the Interstate Oil and Gas Compact Commission noted in its 1996 report, *Marginal Oil and Gas: Fuel for Economic Growth*, stripper wells represent the ultimate in conservation because, once plugged and abandoned, access to the remaining gas is lost forever. However, abandonment or improper plugging of wells is a major source of waste. For this reason, Kansas, and most other oil and gas producing states,

encourages stripper well production and proper maintenance as a valuable means of conserving important natural resources.

IV. Conclusion.

The State of Kansas and the Kansas Corporation Commission respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

CARLA STOVALL
ATTORNEY GENERAL OF
THE STATE OF KANSAS
JOHN CAMPBELL
CHIEF DEPUTY ATTORNEY
GENERAL
KANSAS JUDICIAL CENTER
301 S.W. 10TH STREET
TOPEKA, KANSAS 66612
(913) 296-2215

DAVID J. HEINEMANN
GENERAL COUNSEL OF THE
KANSAS CORPORATION
COMMISSION
JOHN MCNISH
ASSISTANT GENERAL
COUNSEL OF THE KANSAS
CORPORATION COMMISSION
1500 SOUTHWEST
ARROWHEAD ROAD
TOPEKA, KANSAS 66604
(913) 271-3110

ROBERT J. WOODY
Counsel Of Record
D. E. WILSON, JR.
RICHARD GREER MORGAN
LANE & MITTENDORF LLP
919 18TH STREET, N.W.
SUITE 800
WASHINGTON, D.C. 20006
(202) 785-6901

Counsel for Amici Curiae